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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

JURISDICTIONAL STATEMENT

San Diego Gas & Electric Company, Appellant, (hereinafter sometimes "the property owner") appeals from the final judgment of the California Supreme Court entered August 22, 1979, denying Appellant a hearing to review the opinion of the California Court of Appeal, Fourth Appellate District, Division One, which held that a property owner may never bring an action in inverse condemnation seeking compensation in money damages for an unlawful exercise of the police power by a governmental entity, even though that action is excessive, arbitrary, unconstitutional, and denies the property owner all

use of its land. Appellant submits this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

On October 8, 1976 a judgment was entered in San Diego County Superior Court awarding money damages to the property owner. (Appendix A) The Findings of Fact and Conclusions of Law entered by the Court established as a matter of fact after full trial of the issues that the actions of the City of San Diego against the subject property constituted a taking without due process of law and just compensation within the meaning of the California and United States Constitutions. (Appendix A) An appeal was taken by the City of San Diego to the California Court of Appeal, Fourth Appellate District, Division One.

On June 13, 1978 the California Court of Appeal filed its opinion, modified on denial of rehearing (Appendix C), affirming the judgment in all respects. The opinion was certified for publication by the Court and was reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103. (Appendix B) When the California Supreme Court granted a hearing on July 13, 1978 (Appendix D), the opinion of the Court of Appeal was "superseded" pursuant to California Rule of Court 976 and is no longer deemed to be published.

The case was never heard by the California Supreme Court. After maintaining the matter on its docket without scheduling oral argument, on June 14, 1979 the California Supreme Court

entered an order (Appendix E) retransferring the case to the Court of Appeal, Fourth Appellate District, Division One, for reconsideration in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). (Appendix F)

The California Court of Appeal, without additional briefing or oral argument, in an unpublished opinion dated June 26, 1979, directly and completely in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that purported exercises of the police power, although arbitrary, unconstitutional, and denying the property owner all use of its land, do not require compensation. (Appendix G)

Appellant property owner's timely petition for rehearing to the Court of Appeal was denied by order filed July 9, 1979. (Appendix H) Appellant property owner's timely petition for hearing to the California Supreme Court was denied on August 22, 1979. (Appendix I)

JURISDICTION

A notice of appeal to this Court was duly filed in the California Court of Appeal, Fourth Appellate District, Division One (the Court having possession of the record of this case), on October 3, 1979 (Appendix J), appealing from the final judgment of the California Supreme Court. This appeal is being timely docketed in this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Appellant charges that the City of San Diego by its purported regulatory actions, in designating property owner's land as open space under its General Plan, in combination with

its zoning actions, its acquisition efforts, and its entire course of conduct, has destroyed the value of the land, prevented all use, and has thereby taken Appellant's property without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The judgment of the state court sustained the validity of these actions under the laws, ordinances, resolutions, and regulations of the City of San Diego and the State of California against the contention that they are repugnant to the Constitution of the United States.

Cases sustaining jurisdiction of an appeal to this Court from a judgment of a state court involving issues of whether a taking of private property has occurred and whether a property owner is entitled to compensation for the regulatory activities of a state or local government are the following: *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

QUESTIONS PRESENTED

1. Can a state court with impunity deny an aggrieved property owner its constitutionally mandated remedy of just compensation when a local government entity has

   (a) imposed arbitrary, excessive, and unconstitutional land use regulations;

   (b) commenced, but later abandoned direct acquisitive efforts under its power of eminent domain when its public purpose was satisfied by the restraints of the purported regulations; and

   (c) through a continuing course of conduct acted so as to deprive the property owner of all practical, beneficial or economic use of its property;

and the property owner has so established as a matter of fact after full trial of the issues?

2. Is not a remedy in money damages for inverse condemnation for a property owner aggrieved by oppressive regulatory activity under the guise of the police power mandated by

   (a) sound public policy, as an indispensable check against the arbitrary and capricious excesses of local government land use regulation masquerading under the banner of the police power;

   (b) an unbroken line of federal decisions, interpreting and applying the United States Constitution; and

   (c) the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Is the purported invalidation remedy proffered by the California state courts a constitutionally adequate substitute for just compensation where the conduct complained of by the property owner is not a single regulation, but a continuing course of conduct, including arbitrary and capricious planning and zoning activities, intertwined with acquisitive intent, and punctuated by abortive direct condemnation efforts?

4. Does either the purported social desirability of unfettered planning discretion or the potential inhibiting financial force of inverse condemnation damages warrant or permit the

California courts to deny a property owner just compensation for the taking of private property for public use as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as applicable portions of the California statutes and San Diego ordinances and resolutions are set forth in Appendix K.

STATEMENT OF THE CASE

Appellant in 1966 assembled a 412 acre parcel of land for possible future construction of a power plant. The property was zoned at the time of acquisition as M-1-A (industrial) and A-1-1 (agricultural holding), and the General Plan of the City of San Diego adopted in 1967 and reaffirmed through 1972, designated the property as industrial. The property that is the subject of this suit is approximately 206 acres of this parcel, 25 actually acquired from the City of San Diego in 1966. The land is located in the Sorrento Valley area of San Diego, in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content. The land is unoccupied except for utility lines.

Considerable industrial development took place in the Sorrento Valley area from 1966 through 1972. A January 1972

report, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley area was one of the most desirable areas in the city for industrial expansion.

Commencing in early 1972, the City of San Diego began to formulate a plan to preserve and maintain open space in order to meet state statutory requirements.[1]

In March of 1972 the San Diego City Council met and asked the City Planning Director and the City Attorney to determine a schedule of areas that the City could preserve as open space by rezoning. Throughout 1972 the City's plans for acquisition of open space land continued, including discussions of an open space bond issue for the November election. The City Council in August of 1972 initiated a rezoning of the subject property in Sorrento Valley from M-1-A (industrial) to A-1-10 (agricultural holding) or other appropriate zone. The open space bond issue on the November 1972 ballot failed.

The General Plan of the City of San Diego was also being revised to provide for an open space element which State law required to be adopted by June 30, 1973. A portion of the subject property was designated as open space for public acquisition.

[1] The California Legislature in the late 1960's and early 1970's adopted a panoply of legislation pertaining to acquisition of "open space" land by local governments, which it declared to be a "public use" for which use of the power of eminent domain was authorized. (Government Code Sections 6950 *et seq.*) In 1972, legislation was enacted which required cities to adopt a General Plan with open space elements (Government Code Section 65302.2) and to adopt an open space zoning ordinance (Government Code Sections 65910-12). See Appendix K.

Concurrent with these changes in the General Plan, efforts were being made in the City's Community Development Department for the funding of open space acquisitions in preparation for a September, 1973 election. The acquisition cost of 120 acres of the subject land was estimated to be $900,000.

On April 17, 1973 the City Council adopted a resolution of public convenience and necessity, (Resolution No. 207761, Appendix K-8) and proposed a $22.5 million bond issue for acquisition of park reserve areas to be approved at the September, 1973 municipal election. No properties were specifically described, but the subject property was subsequently shown on maps publicizing the election as one of the properties to be acquired, as the trial court found and the California Court of Appeal affirmed. (Finding of Fact No. 24, Appendix A-7; original Court of Appeal Opinion, Appendix B-12).

In April, 1973 the Planning Commission held public hearings regarding the rezoning of property for "open space." The Commission recommended a downzoning of a portion of the subject property (approximately 39 acres) from industrial to agricultural, but recommended that a substantial portion (approximately 77 acres) remain designated as industrial and that a further segment (approximately 50 acres) be considered for future industrial use on the submission of a specific plan for development.

The Planning Commission scheduled its first public hearing on the new open space element to the City's General Plan for May 16, 1973. The plan as submitted proposed to designate only a portion of the subject property as open space, roughly the same portion as previously downzoned by the Planning Commission (approximately 39 acres). Because the proposed

plan was only made available to the public 24 hours before the hearing, a continuance was granted.

Representatives of the Planning Department and the Community Development Department realized at the time of the May 16 hearing that the plan did not conform to the plan being developed for the proposed bond issue. Revisions were made in an effort to coordinate the plans. The effect of the revision was to include the entirety of the subject property under the "open space" designation. When the continued hearing was held on May 23, 1973, the maps contained in the report, which was submitted to the Planning Commission and to the public, still erroneously reflected the earlier indication that only approximately 39 acres were to be designated as open space. No mention was made that the exhibits had been altered and, in fact, the property owner was unaware that a change had been made, and of the impact of that change on its property. The revised open space plan was adopted by the Planning Commission.

The City Council on May 30, 1973 received the report from the Community Development Department pertaining to the bond issue, entitled "Staff Report, Park Reserve Systems, April 29, 1973." The report designated substantially all of the subject property for acquisition as open space.

On June 7, 1973, the City Council accepted the recommendation of the Planning Commission and downzoned a portion (approximately 39 acres) of the subject property, but retained a substantial portion of the property in the industrial zone and retained a further portion as recommended for consideration as future industrial.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The resultant effect was that the City Council designated as open space on June 19, 1973, property which it had only twelve days earlier specifically reviewed and recommended for retention in industrial zoning.

Testimony received from expert witnesses at the trial established that after the open space element was adopted, the land had no practical, beneficial or economic use, since no use which was consistent with the open space designation was economically or practically feasible.[2] The property at the time

[2] The definition of "open space" in the City's General Plan is: "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

San Diego Municipal Code section 61.0601 defines open space as: "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the 'Progress Guide and General Plan for the City of San Diego' as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

There was testimony from expert witnesses that the City required zoning to be consistent with the General Plan.

of trial, and today, is devoted solely to public use as open space, the use for which acquisition was sought by the City. Since the imposition of the open space designation, no further efforts have been made by the City to acquire the property through direct exercise of its power of eminent domain.

The trial court found and the Court of Appeal affirmed that, as a matter of fact, it would have been totally impractical and futile for the property owner to have applied for approval of any development on the portion of the property designated as "open space." (Finding of Fact No. 32, Appendix A-8; original Court of Appeal opinion, Appendix B-12).

The trial court found that the actions of the City of San Diego were:

> "motivated to achieve a public purpose . . . were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial, or economic use of the property . . . and, therefore . . . constitute a taking without due process of law and just compensation within the meaning of the California and United States constitutions. . . ." Conclusion of Law No. 1, Appendix A-8.

The judgment of the trial court was appealed by the City, and originally affirmed by the California Court of Appeal, Fourth Appellate District, Division One. See Appendix B.

The California Supreme Court granted hearing but later retransferred the case back to the Court of Appeal to be

reconsidered in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979).[3]

The Court of Appeal on reconsideration reversed the judgment, holding that a property owner may never sue in inverse condemnation and seek compensation for the exercise of the police power by a government entity, even though the challenged regulations and actions are excessive, arbitrary, unconstitutional and deny the property owner all use of its land.

HOW THE FEDERAL QUESTION IS PRESENTED

Appellant in its complaint alleged that the actions of the City of San Diego leading up to and including the zoning of its property for agricultural and manufacturing, but including it within the open space designation of the General Plan of the City of San Diego, was a "tak[ing] of plaintiff's property for public use without compensation."

The San Diego County Superior Court found that the actions of the City "taken as a whole, constitute a taking of the portion of plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and the United States constitutions, and further constitute a damaging of the remainder of the larger parcel of plaintiff's property." Appendix A.

[3] Appeal of the *Agins* case to this Court has been docketed as 79-602. This case was a companion case with the *Agins* case at the California Supreme Court. When probable jurisdiction is noted in *Agins*, it may be desirable to consider the similarity of issues presented by these two cases. It is noted that while *Agins* is a pleading case, this case presents a full factual record after trial.

The Court of Appeal in its original review of the judgment found that the combination of the zoning of the property, its inclusion in the open space element, the City's policy of requiring consistency between zoning and the general plan, plus the City's efforts to acquire the land for open space had deprived the owner of the beneficial use of the land, concluding, "this is an example of inverse condemnation and the landowner should, under the Constitution, be compensated." Appendix B.

The California Supreme Court, after having granted a hearing in this case, rendered its decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979) in which it held:

> "A local entity's exercise of its police power which, . . . may exceed constitutional limits [does not] necessitat[e] the payment of compensation." 24 Cal.3d at 272.

Giving lip service to the fact that the Fifth Amendment of the United States Constitution prohibited the taking of private property for public use without just compensation, the Court nonetheless concluded, "the need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . .", describing compensation as an "undesirable remedy." 24 Cal.3d at 274, 276-77.

When the Court of Appeal reconsidered the instant case, upon retransfer from the California Supreme Court, it reversed the judgment of the trial court (as well as "reversing" its own earlier opinion), finding,